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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. 127

THE SEVEN UP COMPANY,
Petitioner,

v.

CHEER UP SALES COMPANY OF ST. LOUIS, MISSOURI, a Corporation, AMERICAN SODA WATER COMPANY, a Corporation, and ORANGE SMILE SIRUP COMPANY, a Corporation,
Respondents.

## PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
For the Eighth Circuit

and

## BRIEF IN SUPPORT.

FRANK Y. GLADNEY,
JOHN H. CASSIDY,
Counsel for Petitioner.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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## PETITION FOR WRIT OF CERTIORARI

**To the United States Circuit Court of Appeals for the Eighth Circuit.**

Your petitioner, The Seven Up Company, prays that a writ of certiorari issue directed to the Circuit Court of Appeals for the Eighth Circuit, commanding said court to certify and send to this court a full and complete transcript of record of the proceedings of said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 12,955, Civil, The Seven Up Company, appellant, v. Cheer Up Sales Company of St. Louis, Missouri, a corporation, et al., appellants, or so much thereof as is necessary for consideration of the question involved in this petition, to the end that this case may be reviewed and determined by this court as provided for by the Statutes of the United States.

Your petitioner respectfully shows:

## STATEMENT.

There is but a single question involved in this petition, and on that question there is a conflict between the decision in this case and a decision of the Circuit Court of Appeals for the Sixth Circuit, as well as other decisions in other circuits. The question is "what amounts to a sufficient showing to move an appellate court to grant leave to file a bill of review in the trial court."[1] On this question the lack of uniformity has been noticed recently in this court[2] and the conflict is brought into sharper focus by the more recent decision by the Circuit Court of Appeals for the Eighth Circuit, toward which this petition is directed.

The rule applied in the present case is stated by the court in its opinion as follows (R. p. 76):

> "The allowance by an appellate court of a petition for permission to file a bill of review in the trial court is addressed to the sound judicial discretion of the court and should be exercised cautiously and sparingly and only in cases where it is *clearly demonstrated*[3] that the interests of justice will *undoubtedly* be served thereby."

In contrast the applicable rule in the Sixth Circuit has been stated in *Ergy Register Co. v. Standard Register Co.*, 1 F. 2d 11, 12, as follows:

> "The rule is that, whenever the right to file a bill *is at all doubtful, leave is granted as a matter of course.* This does not necessarily involve any consid-

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1 *Hazel Atlas Glass Co. v. Hartford-Empire Company*, 322 U. S. 238, 271 (in the dissenting opinion).

2 *Ibid.*

3 Italics within quotations throughout indicate emphasis supplied by petitioner.

eration whatever as to the sufficiency of the bill, but only as to the apparent right of the plaintiff to file the same."

The diametric difference between these two rules applied respectively in the two circuits on the same subject is quickly apparent. In the Eighth Circuit the showing to support a petition for leave must amount to a clear demonstration beyond a reasonable doubt; while in the Sixth Circuit the presence of any doubt warrants granting the leave. In the Eighth Circuit under the announced rule, the petitioner, in order to have his petition heard, must establish his case without the examination of witnesses in open court, without opportunity to cross-examine opposing witnesses, without the benefit of the rules relating to discovery, and without the other circumstances incident to the usual procedure. But in the Sixth Circuit the right to a hearing by orderly procedure on the bill is not denied unless the "lack of merit is obvious."[4]

The rule of decision of the Sixth Circuit has been adopted in the Third Circuit.

A second rule of decision on the same subject, but differing substantially from both the present rule applied in the Eighth Circuit and the rule of the Sixth and Third Circuits, is applied in the First, Fourth, Fifth, Seventh and Ninth Circuits and by the Court of Appeals for the District of Columbia. It is essentially that the showing should present a *reasonable probability* that the new evidence will lead to a different result.

The question arises from a decision of the Circuit Court of Appeals for the Eighth Circuit (R. pp. 73-78), reported *The Seven Up Company v. Cheer Up Sales Co.*, 153 F. 2d 231, on a petition by The Seven Up Company for leave to file a bill of review in the District Court, in a case theretofore decided by the Circuit Court, reported *The Seven*

[4] *Hazel Atlas Glass Co. v. Hartford-Empire Company*, 322 U. S. 238, 271.

*Up Company v. Cheer Up Sales Co.*, 148 F. 2d 909 (R. pp. 1-9).

The declaration of the rule, which is at variance with the rule in other circuits, was clearly announced as the rule of decision of the case. It was stated as the rule applicable to the issues and the one upon which the court undertook to decide the case on the facts presented. Those facts are summarily stated here, not for the purpose of laying a foundation for an argument on the merits, but for the purpose merely of setting forth the circumstances, unimportant in themselves in a consideration of this petition for a writ of certiorari. The important element is that here the Court of Appeals for the Eighth Circuit applied a rule of decision at variance with other circuits, and denied petitioner a remedy in equity where the remedy would have been allowed elsewhere.

Petitioner, as plaintiff, brought its original suit in the District Court for the Eastern Judicial District of Missouri, alleging infringement of its registered arbitrary trade-mark "Seven Up" or "7 Up" by respondents' mark "Cheer Up," both used on a lithiated lemon-lime soda, and for unfair competition in the use of a confusingly similar package or bottle. Petitioner then being uninformed as to any practice of palming off by respondents' dealers, relied wholly, as it had a right to rely, upon the similarities in appearance of the marks and the bottles to support its complaint. The Circuit Court of Appeals, in affirming[5] a dismissal of the complaint by the District Court, commented with some repetition upon the absence of evidence of palming off and confusion and drew inferences from the absence of evidence on the point (R. pp. 5, 8).

Immediately following the original decision of the Circuit Court, and still without any knowledge of palming off by respondents' dealers, but merely to determine what the

[5] *The Seven Up Company v. Cheer Up Sales Co.*, 148 F. 2d 909, certiorari denied Oct. 8, 1945, ... U. S. ...

facts were, an extensive investigation was made to determine the disposition of respondents' dealers when they were freed from a caution imposed by the pending case (R. p. 6). Respondents' counsel admitted in oral argument on the petition for leave before the court that their dealers, or at least their bottlers, were promptly informed of the decision. We say "immediately following" because the decision was rendered on April 26, 1945 (R. pp. 1, 10), and arrangements for the investigation had been completed three days later, or April 29, 1945 (R. pp. 20, 21).

That investigation covered principal cities in several states. The results were amazing: approximately one-half of respondents' dealers who were sampled delivered or served respondents' "Cheer Up" without explanation when "7 Up" was ordered (R. pp. 21, 30). Such a course of conduct cannot exist as a pattern and will not be continued unless successful, nor could it be successful unless it were aided by the similarities in names and packages, and these similarities are provided by respondents.

The results of the investigation were summarized by affidavits in support of the petition for leave to file a bill of review (R. pp. 19, 27). Permission was thereby sought to supplement the original complaint to present the issue of palming off and in support thereof to introduce evidence of these facts which had occurred subsequent to the decision of the case (R. pp. 15, 16).

In denying the petition, the court in its opinion stated its conception of the applicable rule, as quoted above, and proceeded to summarize its findings and subordinate conclusions upon which it based its decision (R. pp. 73, 78).

These are—

First, "The exercise of reasonable diligence would have suggested an investigation of the facts prior to the trial." But the facts all occurred subsequent to the trial, and there

is not a scintilla of evidence that similar facts existed prior to the decision.

Second, "But had the evidence now available been discovered and offered upon the trial it would not have affected the result." But this is not only error, and a usurpation of the jurisdiction of the District Court, but also contrary to the rule of the case announced in the original opinion.[6]

Third, "The professional investigators employed by the petitioner * * * were not deceived." But that finding is immaterial to any issue presented by the petition for leave and ignores the actual relevancy of the facts uncovered by the investigators.

Fourth, "Their reports are disputed." And in this an unessential and critical difference between the rule at present announced in the Eighth Circuit and the rule in the other circuits is most pronounced. For in the Eighth Circuit, the requirements are that the case on presentation of the petition for leave without aid of discovery, subpoena and examination of witnesses, and cross-examination of opposing witnesses, must be made out to a clear demonstration beyond a reasonable doubt. Elsewhere, probable cause only sufficient to create a doubt need be shown in order that the petitioner may pursue his remedy.

**Jurisdiction.**

The judgment of the Circuit Court of Appeals was entered February 4, 1946 (R. pp. 77-78). Petition for rehearing, timely filed by petitioner (R. pp. 79-112), was denied on March 5, 1946 (R. p. 113).

Jurisdiction of the District Court under the original cause and the petition for review is invoked under the Trade-Mark Laws of the United States, and more particu-

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[6] Cf. *Hazel Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238, 246-247.

larly *U. S. Code,* Title 15, §§ 97 and 102, and Title 28, § 41 (7). Since the charge of unfair competition includes trade-mark infringement there is substantially a single cause of action, and jurisdiction of the federal court is supported by *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.,* 305 U. S. 315, 325, 336. Jurisdiction of this court is invoked under § 240 of the *Judicial Code* as amended, *U. S. Code,* Title 28, § 347 (a) and Title 15, § 98, and is supported by *Hazel Atlas Glass Co. v. Hartford-Empire Co.,* 322 U. S. 238.

**Statutes Involved.**

The question presented does not involve directly the interpretation of any statute of the United States.

**The Question Presented.**

The question presented is what amounts to a sufficient showing to move an appellate court to grant leave to file a bill of review in the trial court.

**The Reason Relied on for Granting the Writ.**

The Circuit Court of Appeals for the Eighth Circuit has rendered a decision in conflict with the decisions of other Circuit Courts of Appeal on the same matter, and more particularly with one rule of decision exemplified by an opinion of the Circuit Court of Appeals for the Sixth Circuit, *Egry Register Co. v. Standard Register Co.,* 1 F. 2d 11, 12, and a different rule of decision followed in several other circuits, exemplified by *In re Gamewell Fire-Alarm T. Co.* (C. C. A. 1), 73 F. 908, 913.

Wherefore, petitioner respectfully submits its petition for writ of certiorari.

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Counsel for Petitioner.

# BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

## OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. pp. 76-77) is reported *The Seven Up Company v. Cheer Up Sales Co. of St. Louis, Mo., et al.*, 153 F. 2d 231.

## JURISDICTION.

The jurisdictional statement appears in the Petition for the Writ of Certiorari.

## STATEMENT OF THE CASE.

The essential facts are set forth in the Petition.

**Errors Relied Upon.**

Upon allowance of the writ, petitioner will rely upon the following errors of the Circuit Court of Appeals:

1. The court erred in denying petitioner's petition for leave to file its bill of review in the trial court in that it applied an erroneous rule or test, stated in the opinion as follows: "The allowance by an appellate court of a petition for permission to file a bill of review in the trial court is addressed to the sound judicial discretion of the court and should be exercised cautiously and sparingly and only in cases where it is clearly demonstrated that the interests of justice will undoubtedly be served thereby."

2. By applying said erroneous rule, the court erred in finding and holding, "The exercise of reasonable diligence would have suggested an investigation of the facts prior to the trial."; in that, since the facts relied upon to support the proposed bill all occurred subsequent to the trial, and

there is not a scintilla of evidence that similar facts existed prior to the decision, the court based its finding upon a mere supposition that such facts did exist previously, and required of petitioner not merely reasonable diligence but a practice of the art of divination.

3. By applying said erroneous rule, the court erred in finding and holding, "But had the evidence now available been discovered and offered upon the trial it would not have affected the result."; in that the said holding is a usurpation of the jurisdiction of the District Court and, being contrary to the rule of the case announced in the original opinion, is, therefore, based upon a different and more stringent test or rule of decision than was applied originally or than should be applied on such a petition for leave.

4. By applying said erroneous rule, the court erred in considering the fact, "The professional investigators employed by the petitioner * * * were not deceived," because, under a proper rule, such fact would be wholly immaterial to any issue presented by either the petition for leave or the proposed bill of review, and the finding ignores the force and relevance of the facts uncovered by the investigators.

5. By applying said erroneous rule, the court erred in considering the fact or finding, "Their reports are disputed," because under a proper rule, this is not ground for denying a petition for leave and the jurisdiction for resolving disputed facts is in the trial court alone.

## ARGUMENT.

**Summary.**

"On the question what amounts to a sufficient showing to move an appellate court to grant leave to file a bill of review in the trial court, the authorities are not uniform."

That lack of uniformity is brought into clearer focus by the present decision, which announces and applies a rule requiring such showing to amount to a clear demonstration beyond a reasonable doubt.

This rule or test differs from two distinct rules, or patterns of decision, applied in other circuits, which also differ materially one from the other. In the one pattern (Sixth and Third Circuits) "Whenever the right to file a bill is at all doubtful, leave is granted as a matter of course." In the other pattern (First, Fourth, Fifth, Seventh, Ninth and Dist. of C.) the sufficiency is measured by the "reasonable probability" of a changed result.

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**Foreword.**

A single question is involved in this petition and a single ground relied upon for granting the writ. The argument, therefore, is limited to a single point: The decision is in conflict with the decisions of other circuit courts of appeal on the same matter.

The question presented is what amounts to a sufficient showing to move an appellate court to grant leave to file a bill of review.

The rules of decision of the several circuit courts of appeal on this subject fall into three distinct patterns:

1. The present decision of the Circuit Court of Appeals for the Eighth Circuit, holding that the leave should be

granted "only in cases where it is clearly demonstrated that the interest of justice will undoubtedly be served thereby."

2. The rule in the Sixth and Third Circuits: "Whenever the right to file a bill is at all doubtful, leave is granted as a matter of course."

3. The rule in the First, Fourth, Fifth, Seventh and Ninth Circuits and the Court of Appeals for the District of Columbia: That the alleged newly discovered evidence would probably lead to a different result.

The lack of uniformity of decision on the question has been noticed recently by members of this court. In the dissenting opinion in *Hazel Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238, 271, it is said:

> "On the question what amounts to a sufficient showing to move an appellate court to grant leave to file a bill of review in the trial court, the authorities are not uniform."

While this statement is taken from a dissenting opinion, it is a statement of fact about which in that case there was no division between the justices. That the majority of the court also recognized the lack of uniformity is indicated by the following discreet language in their opinion (322 U. S., l. c. 248):

> "The hearing conducted by the appellate court on the petition, which may be filed many years after the entry of the challenged judgment, *is not just a ceremonial gesture.* The petition must contain the necessary averments, supported by affidavits or other acceptable evidence; and the appellate court may in the exercise of a *proper discretion* reject the petition, in which case a bill of review cannot be filed in the lower court."

Certainly it is a correct statement of the facts, as will be demonstrated by a later consideration of the authorities. That lack of uniformity has been brought into sharper focus by the decision in the present case, which not only differs from the decisions on the same subject in other circuits but does in fact establish a rule which is unique in itself and differs from already diverging opinions.

**The Rule of the Present Decision, Eighth Circuit.**

In considering the rule announced by the Circuit Court of Appeals for the Eighth Circuit in the present case, we may point out the nature of the decision, how that decision differs from the rule prevailing in the other circuits, and incidentally its apparent genesis. The origin of the announced rule is interesting since the court has departed from the "reasonable probability" rule as it had existed in the Eighth Circuit and as it exists in several of the circuits. This departure has been toward a stricter requirement of the petitioner to support his petition for leave. This may be compared to the Third Circuit, which has also departed from the "reasonable probability" rule, and has followed the rule in the Sixth Circuit where the requirements of the petitioner are the least exacting.

To repeat, the rule applied in the present case is stated by the court in its opinion as follows:

> "The allowance by an appellate court of a petition for permission to file a bill of review in the trial court is addressed to the sound judicial discretion of the court and should be exercised cautiously and sparingly and only in cases where it is *clearly demonstrated* that the interests of justice will *undoubtedly* be served thereby."

The effect is to require of the petitioner a clear demonstration beyond a reasonable doubt as a precedent to the

allowance of a petition for leave. That is to say, a petitioner without the right "to summon, to examine, and to cross-examine witnesses, and to have a deliberate and orderly trial of the issues according to the established standards,"[7] is placed under the heavy duty of demonstrating the justice of his cause clearly and beyond a reasonable doubt.

Considering the fact that the court comments disparagingly upon the fact that petitioner's evidence is disputed, the rule would seem to mean that petitioner must demonstrate his position to the point that it will be impossible to dispute it.

The rule in the Eighth Circuit was at one time substantially in conformity with that rule now prevailing in a number of other circuits, but not universally; that is, it followed the reasonable probability rule.

In *Irvin v. Buick Motor Co.* (C. C. A. 8), 88 F. 2d 947, 951, the rule is stated as follows:

> "Newly discovered evidence, in order to move a court in granting a new trial, or in sustaining a bill in the nature of a bill of review, must be competent and relevant to the issues and such, and of such weight and nature, as that if added to the evidence already in the case *would reasonably and probably serve to change* or reverse the judgment or decree attacked."

In *Bosley v. Wirfs* (C. C. A. 8), 20 F. 2d 629, the court said:

> "But we are not deciding, *nor have we the jurisdiction now to decide,* what the effect of this oral evidence which the appellants seek to introduce may or will be, if received. We are now called upon to decide, and we do decide, only that the affidavits are such that they furnish *reasonable ground* for this court to per-

[7] Quoted from *Hazel Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238, 271.

mit the appellants to make a motion in the court below to open the case for the purpose of presenting to that court evidence of the prior use the appellants claim."

In *Atchison, T. & S. F. Ry. Co. v. United States* (C. C. A. 8), 106 F. 2d 899, 902, the test is stated as follows:

> "These facts should be supported by affidavits of witnesses competent to testify to them, so as to enable the court to determine whether the newly discovered evidence when produced will be material to the issue and of such character *as probably to change the result.*"

In *Obear-Nester Glass Co. v. Hartford-Empire Co.* (C. C. A. 8), 61 F. 2d 31, 34, the measure applied was whether the new evidence "would probably produce a different result." This test, "probably produce a different result," is repeated, l. c. 35.

In looking for the genesis of the new rule and the departure from the old, we find in the last mentioned case, *Obear-Nester Glass Co. v. Hartford-Empire Co.*, 61 F. 2d, l. c. 34, substantially the same language, but the language there was in the nature of dicta and apparently related to the allowance of the bill of review by the trial court upon a complete showing and after an orderly trial of the issues according to established standards. This later statement is made because, as shown in the preceding paragraph above, the court in its decision on the petition for leave applied the test not of a clear demonstration beyond a reasonable doubt, but whether the newly discovered evidence "would probably produce a different result."

Going back in the authorities we find that the antecedent of this statement probably is an opinion by Justice Story, in *Wood v. Mann.*, F. Cas. 17953, 30 F. Cas., l. c. 458, where the following language is found:

> "I have thus gone over the principal cases (with an

> exception which will presently appear), which seem to me to be applicable to the more general question before the court. The result has been already incidentally suggested. But I will give it a more direct and positive form. It is, that there is no universal and absolute rule, which prohibits the court from allowing the introduction of *newly discovered evidence of witnesses to facts in issue in the cause,* after publication and knowledge of the former testimony, and even after the hearing. But the allowance of it is not a matter of right in the party, but of sound discretion in the court, to be exercised cautiously and sparingly, and only under circumstances, which demonstrate it to be indispensable to the merits and justice of the cause."[8]

An examination of the case, *Wood v. Mann, supra,* shows that this language was not used with reference to bills of review generally, and of course was not used with reference to a petition for leave addressed to an appellate court. It was used only in the limited circumstances where a bill of review was sought to introduce newly discovered oral evidence of specific facts which had already been in issue in the cause. Such a state of facts was clearly distinguished by Justice Story from a bill of review based on newly discovered documentary evidence, newly discovered facts, or facts which had arisen since the decree.

So far, therefore, as petitioner can find this rule is novel and is borrowed from a rule applicable only to courts of original jurisdiction, and to a particularly limited type of newly discovered evidence, that which is oral and relating to specific facts already in issue.

It is clear, therefore, that the court has departed from the reasonable probability rule formerly used in the Eighth Circuit and now used in a number of other circuits, and has adopted the most stringent rule which was applied originally in American jurisprudence only to cases in-

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[8] The last sentence is quoted in *Craig v. Smith*, 100 U. S. 226, 233-234, where it is applied to the same purpose as used by Justice Story.

volving "newly discovered evidence of witnesses to facts in issue in the cause," as distinguished from newly discovered facts not theretofore in issue, and then only by the trial court after a full hearing.

**The Rule in the Sixth and Third Circuits.**

In the Sixth Circuit, *Egry Register Co. v. Standard Register Co.*, 1 F. 2d 11, 12, the following rule is stated and applied:

> "The rule is that, *whenever the right to file a bill is at all doubtful, leave is granted as a matter of course.* This does not necessarily involve any consideration whatever as to the sufficiency of the bill, but only as to the apparent right of the plaintiff to file the same."

In the Third Circuit, in *Raffold Process Corporation v. Castanea Paper Co.*, 105 F. 2d 126, 129, the above extract from *Egry Register Co. v. Standard Register Co., supra,* is copied and stated to be the applicable law.

Later in the Third Circuit, in *Pittsburgh Forgings Co. v. American Foundry Equipment Co.*, 119 F. 2d 619, in granting leave to file a bill of review the Court of Appeals said:

> "We say again, however, what we stated in the case of Raffold Process Corporation v. Castanea Paper Co., 3 Cir., 105 F. 2d 126, 129, quoting with approval the opinion in Egry Register Co. v. Standard Register Co., 6 Cir., 1 F. 2d 11, 12, viz.: 'The rule is that, whenever the right to file a bill is at all doubtful, leave is granted as a matter of course. This does not necessarily involve any consideration whatever as to the sufficiency of the bill, but only as to the apparent right of the plaintiff to file the same.' "

This makes it clear beyond any doubt that the Third Circuit has adopted the rule of the Sixth Circuit. This is

of some interest because originally that circuit followed a rule comparable to the "reasonable probability" rule. In *Eclipse Machine Co. v. Harley-Davidson Motor Co.*, 286 F. 68, 69, it was held that the new evidence must be "of a character sufficiently decisive on the merits to move the court in its discretion." We have then the illustration of one circuit, the Third, abandoning a rule which may be said to occupy the middle ground and move in a direction toward greater liberality in granting leave, while the Eighth Circuit in the present case has abandoned substantially that same middle ground and moved in the opposite direction toward extreme strictness in granting the leave. Or, in other words, the Third Circuit has moved from the position that the showing must be "of a character sufficiently decisive on the merits to move the court in its discretion," to the position that leave will be granted unless the lack of merit is obvious or unless the lack of merit is free from doubt. And now the Eighth Circuit moves from the middle position, that the showing should be such as to "furnish reasonable ground," to a position requiring that the showing shall be a *clear demonstration beyond a reasonable doubt.*

**Reasonable Probability Rule, First, Fourth, Fifth, Seventh and Ninth Circuits and D. of C.**

The rules in these several circuits seem to have a common ground, and that is that the showing should be sufficient to indicate a reasonable probability that the newly discovered evidence would produce a different result.

In the First Circuit, *In re Gamewell Fire Alarm Tel. Co.*, 73 F. 908, 912, 913, held that the question of materiality was for the appellate court, and that question was decided on the basis of "reasonable probability" while the question of laches would ordinarily be for the decision of the court below.

In *Bresnahan v. Tripp Giant Leveller Co.* (C. C. A. 1), 99 F. 280, 284, the rule is applied in the following language:

> "There are some cases where it is held that, if the claim is made that newly-discovered evidence or patents anticipate the patent previously sustained upon bona fide and strenuous contest, the anticipation must be described in full, clear, and exact terms. We do not consider it necessary to resort to this extreme rule, but are disposed to consider whether the situation now presented, which involves the prior determinations and adjudications, together with the old and the new evidence, presents a case *which fairly calls for a result different* from that heretofore reached in the circuit court and in the circuit court of appeals."

In the Fourth Circuit, *Suhor v. Gooch*, 248 F. 870, 871, the test is stated as follows:

> "The recognized condition of the leave to file a bill of review is that the appellate court must be convinced (1) that the alleged newly discovered evidence would probably lead to a different result, and (2) that due diligence was used to discover it before the trial."

The Fifth Circuit, in *Allis-Chalmers Mfg. Co. v. Columbus Electric & Power Co.*, 22 F. 2d 737, 739, finds the rule as follows:

> "In cases of this kind, it is well settled that leave of the appellate court for permission to apply for a rehearing in the trial court will not be granted unless the newly discovered evidence is so persuasive as that it *probably* would induce a conclusion contrary to that on which the decree is based."

In the Seventh Circuit, *Glade v. Allied Electric Products, Inc.*, 135 F. 2d 590, 592, the rule is whether "the newly discovered evidence would *probably* produce a different result"; although that was on the question of an application to the District Court.

In the Ninth Circuit, *Carson v. American Smelting & Refining Co.*, 11 F. 2d 766, 771, the test is whether "the evidence is so controlling that it would *probably* induce a different conclusion." *Rown v. Brake-Testing Equipment Corporation*, 50 F. 2d 380, 381, is to the same effect.

The Court of Appeals for the District of Columbia, in *Davis v. Casey*, 103 F. 2d 529, 536, announces and follows the procedure of the First Circuit as stated in *In re Gamewell Fire Alarm Tel. Co.*, 73 F. 908, *supra*.

**Conclusion.**

The essence of the rule announced and applied in the present case is that a showing, sufficient to move an appellate court to grant leave to file a bill of review in the trial court, should amount to a *clear demonstration beyond a reasonable doubt*.

This is in conflict with two other rules of decision in other circuits which differ between themselves.

One rule of decision prevailing in the Sixth and Third Circuits is that, "Whenever the right to file a bill is *at all doubtful*, leave is granted as a matter of course."

The other rule of decision prevailing in a number of circuits is essentially that the showing should present a *reasonable probability* that the new evidence will lead to a different result.

In view of the clear conflict, the writ should be granted.

Respectfully submitted,

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## INDEX.



### Cases Cited.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. 1271.

THE SEVEN UP COMPANY,
Petitioner,

v.

CHEER UP SALES COMPANY OF ST. LOUIS, MISSOURI, a Corporation, AMERICAN SODA WATER COMPANY, a Corporation, and ORANGE SMILE SIRUP COMPANY, a Corporation,
Respondents.

## PETITIONER'S REPLY BRIEF.

A single question is involved in the petition, and a single reason relied on for granting the writ. That question is (to repeat), "What amounts to a sufficient showing to move an appellate court to grant leave to file a bill of review in the trial court?" The single reason relied on for granting the writ is a conflict of decisions. Any discussion in respondents' brief not directed to this single point and to this single ground will be ignored here.

Respondents, under their point I, assert there is no conflict. In support of this assertion we find in the argument under its corresponding heading I a statement, wholly unsupported and unexplained, that the "Eighth Circuit Court of Appeals would have found the same result had it used the *obiter dictum* of the Sixth Circuit." Under point III and supporting argument respondents again assert that the rule of the Sixth Circuit, taken from *Egry Register Co. v. Standard Register Co.*, 1 F. 2d 11, 12, is *obiter dictum.* This constitutes respondents' defense to the petition, omitting irrelevant discussion of ancillary matters. An examination will reveal these assertions, or purported defenses, are without substance.

**Egry Register Co. v. Standard Register Co., 1 F. 2d 11, 12.**

The rule stated in that case is as follows:

> "The rule is that, whenever the right to file a bill is at all doubtful, leave is granted as a matter of course. This does not necessarily involve any consideration whatever as to the sufficiency of the bill, but only as to the apparent right of the plaintiff to file the same."

Is that statement *obiter dictum?* A consideration of the point was necessary for a decision on the matter before the court. True, the court had already granted leave to file the bill, but it was necessary to determine the effect of the order granting the leave. The court thereupon announced the rule under which it had acted and was acting in the matter instantly before it. Hence, it was not *obiter dictum* but an announcement of a rule under which the court had acted, was then presently proceeding, and as the established rule and practice of the court.

Respondents do not deny that the Third Circuit has adopted and proceeded according to that rule (Respondents' Brief, pp. 6-7).

**Reasonable Probability Rule, First, Fourth, Fifth, Seventh and Ninth Circuits and D. of C.**

Respondents seem to wholly ignore the reasonable probability rule applicable in the indicated jurisdictions. That is, unless the reference to "Tweedle Dee" and "Tweedle Dum" (Respondents' Brief, p. 15) is intended as a defense.

It can hardly be contended that the requirement on the one hand for a showing such as would "probably" induce a conclusion, and on the other hand the requirement for a clear demonstration beyond a reasonable doubt, exhibit only colorable differences.

**Eighth Circuit Decision.**

An examination of the decision by the Eighth Circuit now before this court will show that it clearly announced the rule of law under which it was undertaking to decide the case. That is the rule which is cited as the basis for this petition.

It cannot be inferred that the court applied any other rule, because it did not; and there is no ground for the speculation that the same results would have been obtained by applying a substantially different rule. In fact, the petition (pp. 5-6) demonstrates in connection with the findings and subordinate conclusions of the court that the decision could only have been made by application of the rule announced and applied by the court.

**Discretion.**

In point II and the discussion thereunder, respondents refer to the discretion that is imposed in a court in such a matter. But judicial discretion is to be exercised under

and in obedience to established rules and practices, not a discretion by a court to formulate its own rules, nor to formulate a rule to fit each individual case as presented, nor a discretion to adopt and apply a rule at variance with applicable substantive law and correct procedural rules.

In *Osborn v. U. S. Bank*, 22 U. S. (9 Wheat.) 738, 866, it is said:

> "Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature, or, in other words, to the will of the law."

**Conclusion.**

In view of the clear demonstration of a conflict of decisions, the allowance of the writ is solicited.

Respectfully submitted,

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FILE COPY



IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. [redacted] 127

THE SEVEN UP COMPANY,
Petitioner,

vs.

CHEER UP SALES COMPANY OF ST. LOUIS, MISSOURI, a Corporation; AMERICAN SODA WATER COMPANY, a Corporation, and ORANGE SMILE SIRUP COMPANY, a Corporation,
Respondents.

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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## INDEX.



### Cases Cited.

**Textbook Cited.**

IN THE

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Respondents.

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This is the second attempt of the petitioner to have this court review this case.

### WRIT SHOULD BE DENIED.

I.

There is no conflict in the decisions of the other Circuit Courts of Appeals with that of the Eighth Circuit. The difference is that of expression and not of substance. Petition does not comply with Rule 38 of this Court.

II.

The law is established by a long line of decisions that a petition for leave to file a bill of review is not a matter of right, but is addressed to the sound judicial discretion of

the appellate court and should be decided upon considerations addressed to the materiality of the new matter and diligence in its presentation.

The Providence Rubber Co. v. Charles Goodyear, 9 Wall 805, 19 L. ed. 828;
National Brake v. Christensen, 254 U. S. 425, l. c. 430, 65 L. ed. 341, 343;
Kissinger-Ison Co. v. Bradford Belting Co., 123 F. 91, 92 (C. C. A. 6);
Suhor v. Gooch, 248 F. 870, 871 (C. C. A. 4), cert. denied 62 L. ed. 1245;
Irvin v. Buick Motor Co., 88 F. (2) 947 (C. C. A. 8), cert. denied 81 L. ed. 1357.

III.

Petitioner relies upon its assertion (p. 7 of Pet. brief) that the Eighth Circuit in this case (153 F. [2] 231), is in conflict with the Sixth Circuit's decision in Egry Register Co. v. Standard Register Co., 1 F. (2) 11, 12. But that case is not in point and besides the Sixth Circuit Court of Appeals affirmed the District Court's dismissal of the bill of review.

IV.

The decisions uniformly hold that where a trade name is not deceptive and the manufacturer has no part in the substitution, then the manufacturer is not responsible for the acts of retailers.

Sir Peter Coats et al. v. Merrick Thread Co. et al., 149 U. S. 562, 37 L. ed. 847;
Kellog v. National Biscuit Co., 305 U. S., l. c. 120-121, 83 L. ed. 79;
Rathbone, Sard & Co. v. Champion Steel Range Co., 189 F. 26 (C. C. A. 6);
Nu Grape Co. v. Glazier, 22 F. (2) 596 (C. C. A. 5);
American Photographic Publishing Co. v. Ziff-Davis Publishing Co., 135 F. (2) 569 (C. C. A. 7).

## ARGUMENT.

### I.

Mr. Chief Justice Taft, in speaking of the general rule applicable to petitions for leave to file a bill of review, in the case of **Toledo Scale Company v. Computing Scale Co.**, 261 U. S. 399, l. c. 425, 67 L. ed. 719, l. c. 730, quoted with approval the observation of Mr. Justice Story in Ocean Ins. Co. v. Fields, 2 Story 59, Fed. Cas. 10406:

> "It is for the public interest and policy to make an end to litigation; but, as was pointedly stated by a great jurist, that suits may not be immortal while men are mortal."

That remark is apropos here. The original case here was tried at great length in the District Court. Judge George H. Moore, on June 29, 1944, dismissed plaintiff's bill. That was affirmed on April 26, 1945, by the Circuit Court of Appeals (8th Circuit), 148 F. (2) 909. Thereafter, motion for rehearing was denied. Petition for certiorari was denied by this Court on October 8, 1945, 90 L. ed. 28. In November, 1945, plaintiff filed its petition for leave to file a bill of review. On February 4, 1946, the Circuit Court of Appeals (8th Circuit) denied the petition, 153 F. (2) 231 (R. pp. 73-78). Motion for rehearing was denied. Now, for the second time, plaintiff is before this court seeking permission to retry this case after it is Res Judicata.

The pretext used by petitioner in an effort to reopen the case was so flimsy that the 8th Circuit Court of Appeals would have found the same result had it used the obiter dictum of the 6th Circuit quoted by petitioner from **Egry Register Co. v. Standard Register Co.**, 1 F. (2) 11, 12.

This Court in a patent case, **Layne & Bowler Corporation v. Western Well Works**, 261 U. S., l. c. 392-393, 67 L. ed. 714, where a writ of certiorari was improvidently granted, said:

> "It is manifest from this review of the conclusions in the two circuits as to the validity of the Layne patent and the proper construction to be put upon the 9th, 13th and 20th claims, that they were really in harmony, and not in conflict, and that there was no ground for our allowing the writ of certiorari to add to an already burdened docket. If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeals. The present case certainly comes under neither head."

Neither does this case.

With equal force it may be said here that to allow a party to come into court again and again after decision, with a claim of newly discovered evidence would offend the doctrine so forcibly expressed by Mr. Justice Field in **Stark v. Starr**, 94 U. S. 477-485, 24 L. ed. 276-278, where it was said:

> "It is undoubtedly a settled principle that a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit if the first fail. There would be no end to litigation if such a practice were permissible."

The above quotation and a citation from **Southern Pacific R. Co. v. U. S.**, 168 U. S., at page 65, 18 S. Ct. 18, 42

L. ed. 355, are found in **Bresnahan et al. v. Tripp Giant Leveller Co.**, 99 Fed., l. c. 283-284 (1st C. C. A.).

In concluding its thought on the subject the First Circuit, at page 285, made the observation that—

> "The decisions (and there are many) all go at least to the extent of saying that the new evidence, to warrant it, must be so cogent and persuasive as to impress the court with the conviction that, if it had been presented and considered on the original hearing, it would have clearly produced a contrary conclusion from the end there reached."

II.

The petition for leave to file a bill of review is like a motion for new trial. **Suhor v. Gooch**, 248 F. 870, 871 (4 C. C. A.), cert. denied 62 L. ed. 1245. It is addressed to the sound discretion of the court.

> Toledo Scale Co. v. Computing Scale Co., 261 U. S., l. c. 420, 67 L. ed., l. c. 728;
> National Brake & Electric Co. v. Christensen, 254 U. S. 425, 65 L. ed. 341, 343.

Thus, it was recently held by this Court in **U. S. v. William R. Johnson**, Feb. 2, 1946, 90 L. ed., l. c. 391, in a case where a litigant sought a new trial charging perjury of a witness. The district court overruled the motion for a new trial. The Circuit Court of Appeals reversed and this Court reversed the Circuit Court of Appeals, saying:

> "but it is not the province of this court or the Circuit Court of Appeals to review orders granted or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact (citing cases). While the Appellate Court might intervene when the findings of fact are wholly unsupported by evidence (citing cases) it should never do so where it does not clearly appear that the findings are not supported by any evidence."

This is stronger language than used by the 8th Circuit Court of Appeals in this case.

This Court in **National Brake v. Christensen,** 254 U. S. 425-430, 65 L. ed., at page 343, after citing a number of cases, again said that such applications are addressed to the sound discretion of the appellate tribunal and should be decided upon considerations addressed to the materiality of the new matter and diligence in its presentation.

This is the rule formerly, as well as presently, stated by the Eighth Circuit.

Atchison, T. & S. F. Ry. v. U. S., 106 F. (2) 899;
Irvin v. Buick Motor Co., 88 F. (2) 947, Cert. and rehearing denied 81 L. ed. 1357;
Obear Nester Glass Co. v. Hartford Empire Co., 61 F. (2) 31.

III.

An examination of **Egry Register Co. v. Standard Register Co.,** 1 F. (2) 11, 12 (6th C. C. A.), upon which case petitioner relies so heavily, reveals that the phrase "The rule is that, whenever the right to file a bill is at all doubtful, leave is granted as a matter of course" is at best **Obiter Dictum.** The language had no relation or any application to the issue before the court. It had no connection, even remotely, with the decision. The Sixth Circuit affirmed the District Court's dismissal of the bill of review. Upon reading the whole paragraph, the sentence appears to be an interpolation carelessly thrown in where it had no place and a matter of no importance. It may aptly be said that in emphasizing that case petitioner is attempting to make a mountain out of a mole hill.

As to the decisions of the Third Circuit, to which petitioner alludes, it is to be noted that in **Raffold Process Corp. v. Castanea Paper Co.,** 105 F. (2) 126, the Court denied petitioner leave to file bill of review. In **Pittsburgh**

**Forgings Co. v. American Foundry Equipment Co.**, 119 F. (2) 619, the Court does not favor us with any statement of facts upon which its utterance may be predicated.

## IV.

**The uniform line of decisions hold that where a trade name is not deceptive and the manufacturer has no part in the substitution, then the manufacturer or distributor is not responsible for the acts of retailers.**

Sir Peter Coats, et al. v. Merrick Thread Co. et al., 149 U. S. 562, 37 L. ed. 847;
Kellog National Biscuit Co., 305 U. S., l. c. 120-121, 83 L. ed. 79;
Rathbone, Sard & Co. v. Champion Steel Range Co., 189 F. 26 (C. C. A. 6);
Nu Grape Co. v. Glazier, 22 F. (2) 596 (C. C. A. 5);
American Photographic Publishing Co. v. Ziff-Davis Publishing Co., 135 F. (2) 569 (C. C. A. 7).

The real respondent in this case from its inception was and is the Orange Smile Sirup Co. It is the manufacturer of the Cheer Up extract used by bottlers to make the finished product. It is the owner of the Cheer Up trade name. The other respondents are nominal and only incidental to the issue.

Nowhere in petitioner's affidavits was the Orange Smile Sirup Co. charged with substitution or having knowledge thereof, directly or indirectly acquired, of any retailer, as alleged, substituting Cheer Up for 7 up.

No charge was made in the affidavits that any Cheer Up bottler substituted, or had knowledge of any substitutions by retailers. The respondent Orange Smile Sirup Co. sells only to franchise bottlers. The bottlers sell to retailers. Therefore, the alleged substitutions were to have been committed by retailers who were twice removed from the respondent Orange Smile Sirup Co.

## V.

### Comment On Petitioner's Statement.

Petitioner, on page 4 of his brief, states that the Eighth Circuit Court of Appeals, in the original case, 148 F. (2) 909, in affirming the dismissal of the complaint by the District Court, "commented with some repetition upon the absence of evidence of palming off and confusion and drew inferences from the absence of evidence on the point." No such inference can be drawn when the whole opinion is read. Petitioner omitted reference to the following language, at page 912 of the opinion:

> "When we compare the appearance of the marks, we see no deceptive similarity, and the pronunciation is unlike. We are impressed, the contrast is more striking than the similarity."

and at page 913:

> "The difference in appearance between the competing packages is sufficiently distinctive to identify each of them and to avoid any reasonable probability of confusion. This is all the law requires. The defendants are not required in equity, to insure plaintiff against confusion by careless purchasers."

Petitioner also ignores the conclusions of the court at pages 912 and 913:

> "We cannot see probability of confusion or deception resulting from the concurrent marketing of the two packages in the same territory."

Petitioner makes the bald statement (brief p. 5):

> "The investigation covered several cities in several states. The results were amazing; approximately one-half of respondents' dealers who were sampled, delivered or served defendant's 'Cheer Up' without explanation when '7 up' was ordered."

First, the word "dealers" is too broad. It implies a relationship with the real respondent. There is no contact or relationship with that respondent and the retailers. Next, not one of the investigators, nor one of the 7 up salesmen, was in the slightest manner confused or misled. Each one, in fact, sought to get a product other than 7 up. The 7 up employees (R. 28, 29) studiously and with foreknowledge went to places that did not have 7 up and then asked for it (Affidavits, R. 68-72).

Petitioner complains (brief pp. 5-6) of the findings of the Circuit Court of Appeals (R. 73 et seq.) to the effect that "the exercise of reasonable diligence would have suggested an investigation of facts prior to the trial." However, the Circuit Court of Appeals promptly said—

> "but, had the evidence now available been discovered and offered upon the trial, it would not have affected the result."

To this last statement of the court, petitioner also objects on the grounds it is a usurpation of the jurisdiction of the District Court. But, that statement of the court is amply supported by the decisions of this Court and the Circuit Courts of Appeals.

> Providence Rubber Co. v. Goodyear, 9 Wall. 805, 19 L. ed. 828;
> Carson v. American Smelting & Refining Co., 11 F. (2) 766, 771 (C. C. A. 9).

Petitioner also dislikes the Eighth Circuit's expression that:

> "The professional investigators employed by the petitioner * * * were not deceived."

That was an irrefutable observation. On the face of the purported investigation, the investigators could not have been deceived.

Likewise, petitioner dislikes the court's statement "their reports are disputed". Of course they were disputed by respondent because the affidavits offered by complainant were incorrect and in some instances false. Petitioner was misled by its own investigators. "Professional detectives have, to some extent, prepared complainant's case; they do not always limit their labors to a mere discovery of the actual facts, but, not infrequently, attempt to make a case." Moore on Facts, Vol. 2, page 1167, citing cases.

The so-called investigations in many instances were made in retail establishments which petitioner knew in advance did not carry 7 up (R. 69).

The Atlantic City bottler of Cheer Up (R. 67) never used the 7 oz. bottle, upon which plaintiff claimed infringement, but only sold Cheer Up in 24 or 32 oz. bottles.

The Erie, Pa., Cheer Up bottler (R. 67), because of the sugar shortage had not bottled Cheer Up in 7 oz. bottles since June 15, 1945 and only used the large 24 oz. bottles. Plaintiff's investigation was made in Erie on September 12, at a time when Cheer Up in 7 oz. bottles could not be had in Erie. In two instances where substitution was alleged, the retailers never at any time handled Cheer Up. This was orally reported to the Circuit Court of Appeals during argument as the affidavits came in too late for printing.

Certainly the Circuit Court of Appeals does not consider such petition and affidavits ex-parte and then gullibly believe what had been submitted. This Court and the Circuit Courts of Appeals have uniformly held that the consideration and action upon a petition for leave to file a bill of review is addressed to the **sound discretion** of the appellate tribunal.

National Brake & Electric Co. v. Christensen, 254 U. S. 425, 41 S. Ct. 154, 156, 65 L. ed. 341;
Obear-Nester Glass Co. v. Hartford Empire Glass Co., 61 F. (2) 31, 34 (C. C. A. 8).

In **150 A. L. R. 676**, we find that:

> "The function of a bill of review is the prevention of a miscarriage of justice; and the bill will be allowed only in furtherance of that object and with caution. In other words, the power of a court to allow a bill of review is to be exercised cautiously and sparingly and only under circumstances demonstrated to be indispensable to the merits and justice of the cause. Leave to file will not be granted where the court is satisfied that upon the case offered to be made out the decree ought to be the same as has already been given. 19 Am. Jur., Equity, p. 292, sec. 425; p. 294, sec. 428; and p. 301, sec. 439".

Petitioner claims (pages 1, 12, 13 of its brief) that the Eighth Circuit in this case has departed from its "reasonable probability rule," which rule petitioner says (pp. 13 and 14) was stated in

> Irvin v. Buick Motor Co., 88 F. (2) 947, 951, Cert. denied 81 L. ed. 1357;
> Obear-Nester Glass Co. v. Hartford Empire Glass Co., 61 F. (2) 31, 34;
> Atchison, T. & S. F. v. U. S., 106 F. (2) 899, 902.

Petitioner in an effort to support its statement of the Eighth Circuit's departure from the "reasonable probability rule" has characteristically lifted one sentence in the 7 up v. Cheer Up decision, 153 F. (2) 232 (R. 76), to-wit:

> "The allowance by an appellate court of a petition for permission to file a bill of review in the trial court is addressed to the sound judicial discretion of the court and should be exercised cautiously and sparingly and only in cases where it is clearly demonstrated that the interests of justice will undoubtedly be served thereby."

Again neglecting the paragraph preceding the above quotation wherein the court said:

> "The rules controlling our decision are not in any serious dispute. The law has been reviewed by this court in three comparatively recent decisions: Obear-Nester Glass Co. v. Hartford Empire Co., 8 Cir., 61 F. (2) 31; Hagerott v. Adams, 8 Cir., 61 F. (2) 35, certiorari denied 288 U. S. 599, 53 S. Ct., 317, 77 L. ed. 975; and Hagerott v. Adams, 8 Cir., 70 F. (2) 352. In so far as material these cases and authorities cited and relied upon therein hold that," etc.

The court then continued with its opinion, thus showing that the rule in the above cited cases was adopted in the present case.

The words used in 7 up v. Cheer Up and those in Obear-Nester Glass Co. v. Hartford Empire Co. are almost identical. The court in the Obear-Nester case in referring to a bill of review, p. 34, said:

> "Its allowance rests in a sound judicial discretion to be exercised cautiously and sparingly in cases where it is clearly demonstrated that the interests of justice will undoubtedly be served thereby (citing U. S. Supreme Court cases)."

The same language in the 7 up v. Cheer Up case is quoted by petitioner (brief p. 2) in an effort to show that in that case the 8th Circuit departed from what petitioner refers to as the "reasonable probability rule", after admitting that the 8th Circuit in the Obear-Nestor case followed the "reasonable probability rule" (brief p. 14).

**Hazel Atlas Glass Co. v. Hartford Empire Co.**, 322 U. S. 238, is liberally cited in the footnotes and elsewhere in petitioner's brief (pp. 2, 3, 6, 7, 11, 13) in an effort to support petitioner's various statements. That case involved fraud upon the Court in a patent case. It is not

helpful to either petitioner or respondent. Baseball scores would be just as enlightening for they have no more relation to the issue here than the Hazel Atlas case.

Respondent cannot quite fathom the purpose of petitioner, or the inference intended by its reference to respondent's counsel on pages 4 and 5 of petitioner's brief. Counsel "admitted" nothing in his oral argument. He "asserted" that when the Circuit Court of Appeals handed down its opinion in the original case, 148 F. (2) 909, he prepared for respondent a circumspect and abstract statement of the court's decision. This was mailed to respondant's bottlers. This is as it should be. They had a vital interest in the case. Why the petitioner started its purported investigation within a few days after the decision is not clear. Certainly it had nothing to do with respondent's letters to its bottlers for they had not yet gone out. In all events, petitioner's statement is unwarranted. It is possibly a sly effort at innuendo.

## VI.

## A Review of the Cases Relied Upon and Cited by Petitioner.

An examination of the cases cited by petitioner reveals that certiorari was denied in these cases:

Irvin v. Buick Motor Co., 88 F. (2) 947 (C. C. A. 8), cert. denied 81 L. ed. 1357;
Suhor v. Gooch, 248 F. 870 (C. C. A. 4), cert. denied 62 L. ed. 1245.

The Third Circuit in **Raffold Process Co. v. Castanea Paper Co.**, 105 F. (2) 619, relied on by petitioner, notwithstanding the language used, denied leave to file the bill of review.

In the case of **Egry Register Co. v. Standard Register Co.**, 1 F. (2) 11, the 6th Circuit affirmed the dismissal of the bill of review by the District Court.

Petitioner attempts to find an admission by this court in the majority opinion in **Hazel Atlas Glass Co. v. Hartford Empire Co.**, 322 U. S. 238, l. c. 248, 88 L. ed. 1250, as to lack of uniformity in the Circuits. Such deduction cannot be made out of the Court's language. Petitioner then quotes from Mr. Justice Roberts dissent. However, Mr. Justice Roberts also said, l. c. 1264:

> "On the strongest grounds of public policy, bills of review are disfavored, since to facilitate them would tend to encourage fraudulent practices, resort to perjury, and the building of fictitious reasons for setting aside judgments."

Should petitioner's idea prevail (and it is contrary to the established rule of law), then, any losing party having pursued his case unsuccessfully to the Supreme Court has the right to start all over again. All he has to do is to file a petition for leave to file a bill of review, supported by flimsy affidavits, and then, under petitioner's theory, the Circuit Court of Appeals is required to grant the petition so that he will have the right (brief p. 13) "to summon, examine and cross-examine witnesses, * * *." The case is then back in the District Court. Should the District Court be unimpressed with the new or revamped testimony an appeal is again taken to the Circuit Court of Appeals. Should the Circuit Court of Appeals again affirm then again the party would come to this court with a petition for writ of certiorari. Ad infinitum. By this process a wealthy litigant can use the courts to bring one not so financially situated to the point of exhaustion.

This court's words in **Toledo Scale Co. v. Computing Scale Co.** (page 3 of this brief) and **Stark v. Starr** (page 4 of this brief) are a complete answer to petitioner's fallacious theory.

The 8th Circuit looked to the substance and having the undisputed **discretionary power** under the decisions by this

court, as well as by the circuits, regardless of the language, did reach the right answer under the prevailing rulings. **National Brake v. Christensen,** 254 U. S. 425, 65 L. ed. 341, and in **Providence Rubber Co. v. Charles Goodyear,** 9 Wall. 805, 19 L. ed. 828, where the cases were reviewed back to Story.

The Eighth Circuit in this case has followed, as it should, the rulings of this Court. The petitioner does not submit to this Court any matter of substance, but presumptuously asks the court to grant certiorari for the sole purpose of deciding the figurative difference, if any, between "Tweedle Dee" and "Tweedle Dum."

Respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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